



City of Carmel

Carmel Advisory Board of Zoning Appeals Regular Meeting Monday, October 25, 2004

The regularly scheduled meeting of the Carmel Board of Zoning Appeals met at 7:00 PM on Monday, October 25, 2004, in the Council Chambers of City Hall, Carmel, Indiana. The meeting opened with the Pledge of Allegiance.

Members in attendance were Leo Dierckman, James Hawkins, Earlene Plavchak, Madeleine Torres and Charles Weinkauff., thereby establishing a quorum. Jon Dobosiewicz, Angie Conn and Mike Hollibaugh represented the Department of Community Services. John Molitor, Legal Counsel, was also present.

Mr. Dierckman moved to approve the minutes of the September 27, 2004 meeting, as submitted. The motion was seconded by Mrs. Torres and **APPROVED 5-0.**

Mrs. Conn gave the Department Report. A copy of the letter from Warren Walters regarding Carmel Lutheran Church was before the Board. No action is needed. The Department will handle it as an enforcement issue. She reminded the Board that the Department would like the Board to take action on the date for the December BZA meeting. Alternate dates are December 6 or December 20. An item from the Hearing Officer Agenda was tabled to this full Board Agenda, Arwood Residence. The Board would need to suspend the rules, because Public Notice was 23 days instead of the required 25 days.

Mr. Molitor gave the Legal Report. On pending litigation there was a status conference with the judge in the case of Martin Marietta versus the Board on the appeal of the Board's decision of May 2002 regarding the Mueller North property. The Court will be issuing a writ of certiorari to the Board to certify the Board's record of its decision and the surrounding paperwork to the Court for the Court to begin the judicial review process. The Department will be assembling that record, which will take approximately 30 days. A decision, if the schedule works out, will probably be sometime next spring. Tonight's Agenda has two items relating to Martin Marietta, the Special Use Petition, Item 1h, and Item 2h, the Appeal of the Director's Determination regarding the processing plant. There has been a motion filed with the Board to reverse the order in which the two items would be addressed by the Board. He would recommend the Board re-order the Agenda to hear Item 2h before Item 1h. Also, listed under New Business is Proposed Amendments to Article IX (BZA Rules of Procedure), Section 30.08. Due to the length of the meeting tonight, he recommended that item be put off for another month.

Mr. Weinkauff acknowledged receipt of the Warren H. Walters letter and the Board would hear a status report at the next regularly scheduled meeting.

Mr. Dierckman moved to Suspend the Rules to hear Docket No. 04090026 V, Arwood Residence and to re-order the Old Business to hear Item 2h before Item 1h. The motion was seconded by Mr. Hawkins and **APPROVED 5-0.**

H. Public Hearing.

1-10h. TABLED: ~~116th/Keystone Retail Shops~~

~~The applicant seeks the following development standards variances:~~

~~Docket No. 04080027 V Chapter 14.04.02 60 ft front yard
Docket No. 04080028 V Chapter 14.04.03 30 ft side yard
Docket No. 04080029 V Chapter 14.04.05 30 ft rear yard
Docket No. 04080030 V Chapter 14.04.09 80% lot coverage
Docket No. 04080031 V Chapter 14.06 30 ft greenbelt adjacent to residence
Docket No. 04080032 V Chapter 23A.02 120 ft front yard from US 431 R/W
Docket No. 04080033 V Chapter 23A.03 30 ft greenbelt along US 431
Docket No. 04080034 V Chapter 23A.04 parking prohibited in greenbelt
Docket No. 04080035 V Chapter 25.07.02-9(b) number of signs
Docket No. 04080036 V Chapter 26.04.05 buffer yards~~

~~The site is located at the northeast corner of 116th St. and Keystone Ave.~~

~~The site is zoned B-3/Business within the US 431 Overlay.~~

~~Filed by Steve Hardin of Bingham McHale for Eclipse Real Estate, Inc.~~

10-14h. TABLED ~~Companion Animal Hospital~~

~~Applicant seeks use variance & development standards variance approvals for veterinary hospital.~~

~~Docket No. 04090009 UV Chapter 19.01 permitted uses
Docket No. 04090010 V Chapter 27.05 number of parking spaces
Docket No. 04090023 V Chapter 26.04.05 buffer yard requirements
Docket No. 04090024 V Chapter 19.04.03 side yard setbacks
Docket No. 04090025 V Chapter 19.04.02 front yard setback~~

~~The site is located at 1425 S Range Line Rd and is zoned B-8/Business.~~

~~Filed by Jim Shinaver of Nelson & Frankenberger for Dr. Buzzetti.~~

15-19h. St. Vincent Medical Office Building

The applicant seeks development standards variances for a medical office building:

Docket No. 04090018 V Chapter 25.07.02-10.B number of signs
Docket No. 04090019 V Chapter 25.07.02-10.D ground sign height
Docket No. 04090020 V Chapter 23C.09.D facade projections/recessions
Docket No. 04090021 V Chapter 25.07.02-10.B sign oriented north
Docket No. 04090022 V Chapter 25.07.02-10.B sign oriented south

The site is located at 10801 N Michigan Rd. The site is zoned B-2/Business within the US 431 Overlay Zone. Filed by Mary Solada of Bingham McHale for BW Partners.

Present for the Petitioner: Mary Solada and members of the project team: Glen Hogey, with BW, Tom McLaughlin with Duke, and Greg Ewing, Land Planner for Bingham McHale. She gave a brief overview of the project and a site plan was shown. This site is due north of the Marsh that is located at 1106th and Michigan Road. The site does not have direct street frontage. Access is from a frontage road at the north end. The Weston's neighborhood is to the east, separated by a 50-foot non-build easement with mounding and fencing. There are 70 feet from the western edge of the 50-foot strip to the back of the proposed building. To the north is a retention pond that will be shared with the property to the north whose future use has not been

determined. North of that is the access frontage road. They are requesting a 7-foot ground sign, in lieu of the 6-foot allowed by Ordinance. The ground sign is going to be north of the retention pond, not right in front of the medical building. There is also a pediment detail on top of the sign for aesthetics, adding to the height. The building faces Michigan Road, but has substantial north elevation. The two wall signs are for the north and south facades, so that people traveling both ways on Michigan Road could see the building with advance warning. The Ordinance requires that a long building needs to be broken up every 60 feet with a projection or recession. They are requesting an 83-foot interval. Immediately to the south are the loading docks for Marsh. This is a relatively minor variance in light of the amenities provided by this new building: it's all masonry, its attractiveness, the amount of landscaping and over 100 trees to be planted.

Members of the public were invited to speak in favor or opposition to the petition; no one appeared.

Mrs. Conn gave the Department Report. The Petitioner has work hard to finalize a plan that is acceptable. The Department is recommending positive consideration of all the petitions.

Mr. Hawkins asked about the building address being on the west elevation.

Ms. Solada stated it would be only the number and not North Michigan Road.

Mr. Dobosiewicz stated that all petitions could be voted on in one vote, if the Board wished.

Mr. Dierckman moved to **approve Docket Nos. 04090018V through 04090022V, St. Vincent Medical Office Building**. The motion was seconded by Mrs. Torres. The Public Hearing was closed. The motion was **APPROVED 5-0**.

(Arwood Residence - tabled to the full BZA from the Hearing Officer agenda

The applicant seeks the following development standards variance:

Docket No. 04090026 V Chapter 5.04.03.C.1 side yard aggregate

The site is located at 14442 Cherry Tree Rd. The site is zoned S-1/Residence.

Filed by Michael Arwood.)

Present for the Petitioner: Michael Arwood, 14442 Cherry Tree Road, Carmel. He would like to build a garage on his property. The rear elevation does not allow for the building. He would have a ten-yard setback on each side, but will not be able to maintain the 30-foot aggregate required by the Zoning Ordinance.

Members of the public were invited to speak in favor or opposition to the petition; no one appeared.

Mrs. Conn gave the Department Report. The Department is recommending positive consideration.

Mr. Dierckman moved to approve **Docket No. 04090026V, Arwood Residence**. The motion was seconded by Mrs. Plavchak. The Public Hearing was closed. The motion was **APPROVED 5-0**.

I. Old Business.

2h. Martin Marietta, Appeal to Director's Determination of

The applicant would like to appeal a Director determination that Martin Marietta's operation is a legal, nonconforming use:

Docket No. 04070020 A Chapter 28.06 Existence of a Nonconforming Use
The site is located north of 106th Street and west of Hazel Dell Parkway. The site is zoned S-1/Residence - Low Intensity. Filed by Tom Yedlick.

Mrs. Plavchak recused herself because she had not heard the presentation and argument during the Public Hearing at the Special BZA October 13, 2004 meeting.

Mr. Weinkauff reminded both sides that the Public Hearing was open to allow the Board members to ask questions.

Mr. Thrasher filed an objection to the exclusion of his post-hearing brief by the Department of Community Services, a request for delivery of that brief to the Board, and a request for continuance so that the Board had an opportunity to review the post-hearing brief.

Mr. Molitor stated that the materials were submitted by Mr. Thrasher and Mr. Yedlick on Thursday, October 21, even though the Board had said that they would be accepting no more submittals. Based upon the objection, the Board may wish to consider whether to sustain the objection and to receive the materials that were submitted last Thursday after the Department Report had been circulated to the Board members. Or to overrule the objection and continue with the segment of the Public Hearing for the Board members to ask questions.

Mr. Thrasher stated that he had obtained a copy of the video of the last meeting specifically for this purpose. The motion that was made was that the Board would not accept any evidence at this hearing. There was nothing about submitting briefs or other arguments in the interim for review. DOCS, without reading the content of the document, elected to withhold it. Since DOCS is a party to this appeal, he believed they have a sufficient conflict of interest. That represents a violation of the procedural due process. He felt it was a problem if the Board did not have an opportunity to read the brief.

Mr. Molitor wanted to correct the impression that was made. The Staff was in an awkward position, because technically the Staff or Mr. Hollibaugh is a party to this proceeding. He suggested to the Staff that they hold it until tonight for the Board to consider whether to accept the materials that were submitted later than materials would normally be submitted to the Board.

Mr. Thrasher stated he was not trying to create an error. If the Board does accept the materials and take some time to go through them that will eliminate his objection. If the Board does not, then there might be a problem. He apologized for the lateness of the filing, but he had thought it would go to the Board and not be stopped.

Mr. Weinkauff stated that by voting to accept the objection, it would require the Board to take time now to go over the material or delay the hearing. Because of the re-ordering of the agenda to hear this item first, it would potentially cause them to table Item 1h as well.

Mr. Molitor stated that it was more logical order to hear the Appeal and then to move on to the Special Use. The Board needed to determine if it had fairly heard the issues at the last meeting. Or whether it believed the materials were important enough that the Board needs to take them under consideration. If so, he would not recommend that the Board recess the meeting in order to read them tonight, but would take time to study them and continue this hearing. His recommendation was to follow the procedure laid out at the last meeting, which would be to proceed to a vote tonight. He had not had a chance to review the materials.

Wayne Phears, an attorney for Martin Marietta, stated that if the Board decides to take these materials, it could and should vote tonight. The perception that has been created that the Staff unfairly refused to accept these materials is wrong. It was his understanding that the Staff had a cutoff time and all materials needed to be filed by the cutoff time. He did not feel it was a due process violation. It was Mr. Yedlick and Mr. Thrasher's appeal and they should have gotten their materials in on time. They were the ones who asked that the order be reversed and did not tell the Board that once the order was reversed they would want it delayed.

Mr. Weinkauff asked Mr. Dobosiewicz if a cutoff date had been stated on the video for new material.

Mr. Dobosiewicz had not done a review of the video. His understanding at the conclusion of the meeting was that the Board did not want to receive additional information with regard to this item and the purpose of this hearing was to allow the Board to ask questions. He would look to the Board to acknowledge his understanding or indicate to the Department that they were intending to have additional information distributed before this hearing. The Board may want to comment on the motion that was made at the last meeting.

Mr. Thrasher stated there was no deadline imposed. If this would be continued to a later date, they would have no objection to hearing the Mueller South Sand and Gravel at this time.

Mr. Weiss stated that the Board specifically limited the amount of time that both parties had to present evidence and argument. It seemed this post-hearing brief was just a way of extending the time provided. The Rules of Procedure provide that the Board limits the time. He could have gone back and filed post-hearing briefs and motions. Mr. Yedlick and Mr. Thrasher had the burden of coming forward. He felt their post-hearing brief was argument. He would not object if the Board wanted to admit the brief. Just give them five minutes to make their argument and then vote.

Mr. Dierckman asked about the post-hearing brief.

Mr. Thrasher stated that Mr. Molitor was in possession of the brief. He could present the information.

Mr. Molitor recommended that the Board give each side five minutes to extend the arguments they had made in their closing statements and accept the materials for what the Board could glean from them.

Mr. Weinkauff asked for a motion to allow both sides an additional five minutes to present any evidence at this time. The action died due to lack of a motion.

Mr. Weinkauff stated that Mr. Thrasher's objection was noted.

The Public Hearing was still open for the Board members to ask questions of either party or any remonstrators.

Mr. Hawkins had questions for Martin Marietta. He wanted to know the date of the processing plant.

Mr. Yedlick requested the use of a table. The Staff moved from the table so Mr. Yedlick and Mr. Thrasher would have the same basis as the respondent.

Mr. Weiss stated that there were three processing plants which were introduced into evidence. In 1971 when mining began on the Marburger Farm (Founders Park), there were two processing plants. One was located on the Marburger Farm and the other one was located on 96th Street. The property continued down to Mueller North as one property owned by Martin Marietta. The plant was moved from the Marburger Farm area in the early 1990's to the present location on one contiguous property owned by Martin Marietta that was a mine. The other plant has remained on 96th Street.

Mr. Hawkins asked if it was typical, by mining standards, for a processing plant to be on the site of a mine.

Mr. Weiss replied in the affirmative and stated it was in the testimony by Mr. Karns.

Mr. Hawkins asked why American Aggregates applied for a Special Use in August 1989 for the property at the southwest corner of Gray Road and 106th Street, Tab L in Mr. Thrasher's presentation.

Mr. Weiss did not know when that particular property was acquired. It appeared it was owned by Mr. Morgan and Ms. Pope and was subject to a lease to American Aggregates. At that time, they must have felt they were in an urban area for that site. From the remonstrator's evidence, Kingswood and Woods Creek would not have had eight homes until 1983. This mine commenced about 1964 in Founders Park, no later than 1971 for the Marburger Farm.

Mr. Phears stated that it appeared that Parcel A was owned by C. P. Morgan and Parcel B was owned by Judith Pope and that the applicant acquired an interest in the property perhaps after it became an urban area. They did not own the property prior to 1988. The request for Special Use was to extract sand and gravel. Given that Martin Marietta did not own the property, they probably did not have an interest in it prior to it becoming an urban area.

Mr. Hawkins also asked about what happened to the settlement and release agreement on May 17, 2002. It seemed like all the parties agreed and now they don't.

Mr. Weiss stated that the agreement was reached with a number of parties, including the Kingswood Homeowners' Association. However, individual homeowners within the Kingswood neighborhood appeared and did not agree with the leadership of the Homeowners' Association at that hearing. The matter was presented to the BZA and the vote was 3-2 against the petition. That would have done a number of things, including moving this plant. That decision is on appeal in the Hamilton County Trial Court and has not yet been ruled on. The Board voted adverse to the petition when homeowners in Kingswood decided they did not like the agreement the Homeowners Association had made.

Mr. Phears stated there were two agreements, the 1997 agreement with the City and the 2002 three-way agreement. Both of those addressed existing uses on the property. Mr. Yedlick signed the 2002 agreement on behalf of Kingswood. Now individuals have shown up because they did not sign the agreement.

Mr. Weinkauff reminded the Board that neither of the agreements bound the BZA in any way, shape or form. They may have been agreements by parties who may or may not have had the authority to enter into such agreements on behalf of various other parties.

Mr. Phears stated that they bound the parties and the people acting as the privies, as the law would say.

Mr. Hawkins stated there have been several times when moving the plant has been brought up, but it has not been moved. He wanted to know who was forbidding Martin Marietta from moving the plant.

Mr. Weiss stated that the plant sets on the west side of Hazel Dell. The intent was to move it to the east side. The cost of relocating the plant is in excess of \$2 to \$2.5 million. They can't justify moving it based on the resources unless they are able to mine in additional locations.

Mr. Phears stated that the application that had the settlement agreement in 2002 contemplated the plant would move to the east side of Hazel Dell. That was the one the parties came to the Board hearing thinking it was all worked out, but it blew up at the Board hearing. There are regulations in the Ordinance that need to be complied with in order to relocate the plant. That is the appeal that is pending. Mueller North would give Martin Marietta eight to ten years of reserves to mine, making it economically feasible to move the plant.

Mr. Hawkins asked Mr. Thrasher why the Wood Creek Homeowners had not become involved in the process.

Mr. Thrasher stated that they are located north of Kingswood and apparently feel less threatened by Mueller South. He has been in touch with them. Their neighborhood association is less organized. They offer moral support, but are unable to offer financial support at this time.

Mr. Hawkins asked Mr. Yedlick what makes the 2002 agreement different today.

Mr. Yedlick stated that it provides no zoning basis and nothing with regard to his rights to appeal. The 2002 agreement provided that the Uses that were in place were determined under the State exemption which prevented the City from regulating mining at that time. The Use has changed. Those non-contiguous parcels do not constitute the same mine, just because they are owned by the same person. Secondly, it was said that the area was not urban because there were not eight homes. There are three tests for an urban area. The third test that no one has mentioned is that if land is contiguous to a municipality, it is considered an urban area. This land, including Wood Creek when it was annexed, was contiguous to Carmel. Therefore, that land has been an urban area before that plant was constructed. Therefore, that plant was constructed when it was in an urban area and subject to Carmel zoning. The issue is the change of Use. Bringing in material that is not mined there is a change of Use. Martin Marietta has acknowledged that processing is an integral part of mining. Processing is a subsidiary Use to extraction. In the Ordinance, S-1 does not allow processing. M-1 zoning allows processing of minerals as a Special Use. M-1 allows it and it says specifically "and related processing". That means the processing that is allowed is the processing of the related materials that are extracted. It is not permission to process anything else. A mine is an entity. Processing is for the minerals on that site. They are expanding the mine by bringing materials from Noblesville.

Mr. Thrasher stated that what has changed is that they now have the Leroy K. New letter and the facts as to when the Marburger property was acquired. It was his opinion that what has changed was the interpretation of Non-Conforming Use. The Leroy K. New letter said that Carmel had zoning jurisdiction over that site in 1964, and Martin Marietta did not acquire the site until after that jurisdiction. It was already in an urban area

when it was acquired. Secondly, it could never be a Non-Conforming Use by virtue of that letter, because they were not processing or mining anything on that site at the time and it was already subject to Carmel jurisdiction and the master plan zoning ordinance. The concept of Non-Conforming Use was waived by Martin Marietta by submission of the Leroy K. New letter. Likewise, urban area is not going to help them because they have to not be within the planning jurisdiction of Carmel at the time they are mining. They have always been under Carmel's planning jurisdiction and they have never been a legally established Non-Conforming Use. The 2002 agreement was based on some faulty assumptions and some absence of facts.

Mr. Weiss stated that Mr. Yedlick and Mr. Thrasher were mistaken on the law and the facts. He has confirmed with the Board's counsel, Mr. Molitor, that Mr. Yedlick and Mr. Thrasher are wrong. While the joinder agreement was there because there were not eight homes within 1320 feet of the then existing American Aggregate operations, the City did not have jurisdiction. State statute says the City has no jurisdiction. What Martin Marietta is doing is permitted in the S-1 district. The Staff agrees or they would not have docketed the other case that Martin Marietta has for extraction and processing. In the Schedule of Uses there is no distinction between the Permitted Uses in the S-1 district and the Permitted Uses in the M-1 District as to mineral extraction. The only distinction is an additional requirement under the Development Standard in the M-1 district. What Martin Marietta is doing is permitted in the S-1 district. Processing is an integral part and Martin Marietta can continue to do it. It is not a change of Use. Mr. Yedlick suggested that when he signed the settlement agreement that they did not know about the urban area issue. The settlement agreement specifically states in sub-paragraph recital E that on May 30, 2000, Kingswood brought suit against the City. The purpose of that suit was to determine that Martin Marietta needed a Special Use permit, because they were no longer in a rural area, but were rather urban at that point. In sub-paragraph 3.2, "Kingswood recognizes that the Uses now established on the Martin Marietta parcels, including but not limited to the Hughey operations, constitute legal Non-Conforming Uses". He felt they are both wrong because these are legal Conforming Uses based on the Ordinance. If something is permitted in a particular district at the time it becomes subject to the Ordinance, it is a Conforming Use and does not need a Special Use permit.

Mr. Molitor read from the State statute "for purpose of this section urban areas include all lands and lots within the corporate boundaries of a municipality, any other lands or lots used for residential purposes where there are at least eight residences within any quarter mile square area and other lands or lots that have been or are planned for residential areas contiguous to the municipalities." Then it goes on to say "This chapter does not authorize an ordinance or action of a Plan Commission that would prevent outside of urban areas the complete use and alienation of any mineral resources or forest by the owner or a leinee of them." The settlement agreement proceeded from the assumption that the earlier lawsuit, the one of Kingswood's suit against the City in May of 2000 seeking relief because Martin Marietta had started mining roughly at the northwest corner of 106th Street and Hazel Dell Parkway. Kingswood claimed that the land was in an urban area. The City had, up until that point, assumed that the land was outside an urban area. The whole Township was within the City's jurisdiction because the City had a joinder agreement with Clay Township, whereby the zoning applied throughout the Township. But the State law pre-empted the Ordinance with regard to mineral resources and forests. So the City had proceeded from the assumption that it could not regulate mining operations that were outside this urban area boundary. The Court eventually declared that the Mueller property was within an urban area. The parties were guided by that for the 2002 Settlement Agreement and reached the conclusion negotiated between the City, Martin Marietta, Kingswood Homeowners Association and Martin Marietta's tenant Hughey, that the Uses that were then in existence would be treated thenceforth as legal Non-Conforming Uses. They could continue, but could not be expanded without going before this Board for further approval. For mining and extraction definitions, in his opinion, the S-1 and M-1 districts are identical in regard to that. They both allow mineral extraction and processing as a Special Use within

those zoning districts. The settlement agreement committed the City to the position that those existing Uses as of May 2002 were legal Non-Conforming Uses. The issue here might be if there has been a significant change in any of these Uses since May 2002.

Mr. Thrasher differed with Mr. Molitor. He stated that the non-urban area exception does not and cannot create a legal Non-Conforming Use. It simply puts a damper on its enforcement. It is either a Non-Conforming Use or a Conforming Use. There is no question that they are a Non-Conforming Use. Are they legal or illegal? In order to be legal, they had at some time during that Use to have conformed to an Ordinance, either this one or a preceding one that was superseded. He stated that there was no question that they had ever conformed to an Ordinance. So they are an illegal Non-Conforming Use. The only thing that prevents the Board from exercising jurisdiction would be if they are not in an urban area. They are annexed. As of 2002, they became irrevocably an urban area. The superseding is over; they must conform as of the annexation in 2002. The Board did not sign the 2002 Settlement agreement.

Mr. Yedlick wanted to correct Mr. Molitor and Martin Marietta. He had a copy of the Ordinance. The Ordinance and the Schedule of Uses that Mr. Weiss referred to was contained in an amendment to the Ordinance in Autumn 2003. It changed the Use as was described prior to that time. He had a copy of the Ordinance that was in effect in 2002. It was changed as a housekeeping matter to take all of the Special Uses out of the Ordinances and put them in one section. There was never intent to change any of these Uses. It would have been illegal to change any of the Uses as they were before they were pulled out into this separate section. They would have had to go through the Plan Commission for a change in the Ordinance. The only thing proposed was to consolidate them for ease of administration. It wasn't done properly. The Uses got reworded and as a result a Use was added to S-1 and that was an improper change. The Board can accept that or not. In the 2002 Ordinances that apply in this case, processing was not specified in an S-1 Special Use district. Mineral extraction was permitted in an M-1 district along with related processing. M-1 was the only district that specified related processing as a Permitted Use.

Mr. Hawkins asked Mr. Molitor about the status of a Use that starts before there is any zoning. With all the mines up and down with the contiguous parcels, does that constitute one mine?

Mr. Molitor stated that the general rule in Indiana is that a Use that starts before there is any zoning is considered a legal Non-Conforming Use going forward. There is some case law that Ordinances can phase out Non-Conforming Uses over a period of time. Carmel's Ordinance does not do that and he was not aware of many in Indiana that attempt to do that. The City treated the Mueller North parcel as a legal Non-Conforming Use after it was determined it was no longer in the urban area. From that point it was considered that now the Zoning Ordinance does apply to mineral extraction. Previously under the State statute the State had pre-empted that issue and did not allow the Carmel Zoning Ordinance to cover that. As for the parcels being one mine, it is kind of a factual question based upon the intent of the investor when they acquired the various parcels. If they intended to treat it as one mining operation, then it would be one mine. There is scant case law on that subject in Indiana.

Mr. Thrasher reminded Mr. Molitor of the Stuckman versus Kosciusko County case, which is the junkyard case. The people had five lots. They put a junkyard on three lots and scattered miscellaneous junk on the other two lots. Several years later zoning came in and said no junkyard expansion, so they were a legal Non-Conforming Use. When they later added more junk to the two lots, the Kosciusko County Board of Zoning Appeals said that it was an illegal expansion. That was on land they had already owned and had already started to do some miscellaneous work on the land. That is not the case here. American Aggregates/Martin

Marietta did not own this land or anything close to this land until 1964. They might have had a mine north of 116th Street, but that was not this property. In Indiana they needed to be mining that parcel in 1964.

Mr. Weiss stated that the evidence from Mr. Karns indicated that in 1964 when American Aggregates bought the property, they bought it with the specific purpose of mining the property. The issue is 1983 or 1988 when eight homes were within 1320 feet. From 1971 forward, American Aggregates, and subsequently Martin Marietta, had moved forward on the Marburger parcel south of 116th Street toward the north end of the Mueller property. Factually it has been used as a mine and the intent was established in the evidence that it was going to be used as a mine since 1964. Section 28.01.06 of the Ordinance has a nuance from Indiana State Law on legal Non-Conforming Uses. In the case where otherwise a Special Use permit would be required, the permit was not needed under the Carmel Zoning Ordinance. At that point it was simply conforming. "Existing Uses eligible for Special Use approval shall not be considered legal Non-Conforming Uses nor require Special Use approval for the continuance, but shall require Special Use approval for any alteration, enlargement or extension." That would be Mueller North and that is the next case, but not this case which is on our own property. He felt that Mr. Yedlick gets confused because he thinks that processing of sand and gravel off-site is the problem. He stated that Mr. Molitor is aware of Indiana Case Law and they have sited it to the Board in their materials. On the question of ownership, Mr. Weiss stated processing began in 1954. Martin Marietta acquired all of the parcels known as the Marburger Farm in 1964 and commenced mining in 1971.

Mr. Phears noted that the letter to the commission in 1964 expressly sought confirmation that they could use the property as they had contemplated for mining (the New letter).

Mr. Hawkins wanted to know who broke the 2002 letter of agreement and why had it not been enforced.

Mr. Thrasher stated that it was irrelevant, because it was not intended to control the zoning status of the property.

Mr. Yedlick stated that the Director used the 2002 Settlement agreement as law for purposes of interpreting a Zoning Use. Since that agreement does not establish law, it would be improper to use that agreement. Secondly, what changed was they changed the Use. A mine is a mine and processing is permitted on the minerals extracted from that site. Bringing materials in from another mine to process is a change of Use on that site. Mining is very specific with regard to territorial rights. Once a mine site is established, it can generally be expanded and mined out on the entire site. But under the diminishing asset concept, the whole theory is when those reserves are exhausted, the Special Use for that site is extinguished. To continue the Use as a processing plant for economic reasons and bring material in from off-site is a change in the intended Use.

Mr. Hollibaugh stated that in his determination he used the 2002 Settlement agreement as a launching off point for the determination as to whether the Use had changed during that time between 2002 and now. The City had adopted that agreement which he was holding to, but it was the Zoning Ordinance Chapter 28 dealing with Non-Conforming Uses which was the point of law from which the determination was made.

Mr. Hawkins asked if processing was part of the proposed Mining Ordinance.

Mr. Hollibaugh confirmed that it is.

Mr. Yedlick gave a different view on Mr. Hollibaugh's information. He did not know why Mr. Hollibaugh used the 2002 Settlement agreement as a launching point as if that agreement established some fact in law as to when something began or did not begin. He stated the Mr. Hollibaugh also failed to acknowledge the fact that he had no evidence that processing off-site material was a Use in existence on that date. So there was no basis to say that it can continue since it was a Use in process at that date. Martin Marietta clearly indicated that they did not begin bringing in outside material until late 2002 or early 2003, which was after the settlement date. That was a change in the Use, converting it from a mineral extraction use to a commercial use.

Mr. Weinkauff asked what 116th Street and River Road were like at the time the mining operation was started at the site of Founders Park. Where was River Road?

Mr. Phears stated that from the documents he had seen the bisecting of the Marburger property was not there in 1964. Hazel Dell Parkway did not exist. River Road ended at 106th, jogged right and then north and it appeared to end at 116th Street. In the 1950's or earlier, mining did exist north of 116th St. Mr. Karns' testimony stated that mining of the Marburger parcel began sometime before 1971. Photographs documented it in 1971.

Mr. Weinkauff asked Mr. Molitor regarding the definition of urban area and the eight homes within 1320 feet. But he thought he heard from the reading "or property designated for future home sites."

Mr. Molitor stated that there were three bullet points. The first was lands and lots within the corporate boundaries of the City. The second was at least eight residences within any quarter mile square area. The third was any other land or lots that had been or are planned for residential areas contiguous to the municipality. The Court ruling in the 2000 lawsuit relied on the last item and stated that since the Comprehensive Plan showed that general area as being planned for residential use eventually, the Court said the Mueller property was within an urban area. In the 2002 Settlement agreement, all the parties to the lawsuit agreed that the Uses that Martin Marietta had on the lands that it currently owned would be treated as Legal Non-Conforming Uses.

Mr. Weinkauff wondered if existing subdivisions north of 116th Street and west of Hazel Dell Parkway were planned for future home sites. He also asked Mr. Phears about processing plants at the site of extraction and the economic reasons for not moving it.

Mr. Phears stated that most mining sites do have a processing plant on them. Moving the processing plant to the other side of Hazel Dell Parkway is part of the Mueller North application because there would be adequate reserves for the \$2.5 million move. In a perfect world, they would prefer not to move the plant. But discretion is the better part of valor and they would like to eliminate the issues of the noise at the current processing plant. Importing the material was not a change of Use for the current processing plant. They would not move the plant for the Mueller South site, but would also need Mueller North site approved in order to justify moving the plant. Martin Marietta owns the Marburger parcel. E & H Mueller Development LLC owns Mueller North and South, referred to as the Mueller Conservatorship. Martin Marietta has a lease for the right to mine. American Aggregates or Martin Marietta has never owned the Mueller property.

Mr. Weinkauff was having difficulty with the contiguous property aspect. A City roadway separates the Founders Park property from the Marburger parcel. Additionally, 116th Street separates the original Founders Park parcel and the existing Hazel Dell Parkway. Then 106th Street separates the Mueller North and Mueller

South properties, which Martin Marietta does not own. He wanted to know who owns the property east of Hazel Dell and north of 106th Street.

Mr. Phears stated Martin Marietta owns that property and he thought the City owns the property south of 106th Street. Mr. Molitor stated earlier that if property was acquired predating zoning authority over it, with the intent to mine it, all of that would be treated as a single mine. American Aggregates owned all of it. All of the intervening streets are ignored. Mueller North and South are not part of this appeal. Quoting from Mr. Karns' affidavit, "The Marburger property was acquired for the express purpose and with the intention of mining it." There was no evidence contrary to that in the record. They had kept records of the mining on the property.

Mr. Thrasher did not agree with the intervening roadways statement.

Mr. Phears stated that mining is a non-renewable resource and so things move around on it. There are a large number of cases and most recently the overwhelming number of jurisdictions to consider this issue recognizes that mining must move to continue.

Mr. Weiss stated that it was very typical in rural areas that property owners own to the center line of the road. The municipality ends up with a right-of-way. It does not own fee interest. In this case, 116th Street and River Road were this way. If a party owns on both sides of a road, only bisected by a right-of-way, there is contiguity of ownership, one contiguous parcel, particularly for mining.

Mr. Thrasher stated that they were trying to change time and turn the clock back, by claiming they owned the Keller property on the north side of 116th prior to 1964, an undefined date not in evidence. Suddenly they were able to maintain a Carmel Sand Plant in 2004, several thousand feet away.

Mr. Weiss stated they were not talking about Mueller North or South, but the Carmel Sand Plant on the Marburger property which Martin Marietta has owned since 1964.

Mr. Thrasher pointed out the similar language in the Carmel Ordinance and the Stuckman versus Kosciusko County case, because they were not using two of the lots, they were not allowed to expand on to them. Because they were using the Marburger parcel several hundred feet away, does not mean they could necessarily use this site. The crux of the matter was that they admitted and proved out of their own documents that they acquired the Marburger site, upon which Carmel Sand Plant sets today, in 1964. That same document demonstrated that in 1959 Carmel had a plan and that in 1961 by virtue of the joinder agreement, that plan subjected this entire parcel to planning. His interpretation of 1103 means when the joinder agreement was signed in 1961, this entire parcel became urban area. Since that period of time, American Aggregates has had several ways to solve that problem. They have never been a legally established Non-Conforming Use because they have not conformed to an Ordinance that applied to them. The Ordinance came in 1961; they bought the land in 1964 and started mining in 1971. They never complied and enforcement was withheld on the assumption they were in a non-urban area. He was not trying to go back and penalize them. He was interested in what was going to happen tomorrow. As of tomorrow they are in the City of Carmel and are in an urban area. They have been mining since before 1959, but they did not own the property. They have to try to tie it with Keller. It is across the street and in a different ownership and they do not know when they bought the Keller property. The Stuckman case would say that it was too far. They are a Non-Conforming Use and they are illegal.

Mr. Yedlick stated that a number of incomplete statements were made. First of all, Mr. Weiss kept referring to the Day Case. That was land that was zoned agricultural and permitted for the raising of cattle. They purchased cattle and brought them in to further raise on the land. That was a zone permitted Use, not a Non-Conforming Use. In this case, it is zoned residential and the issue is bringing in material to change a Non-Conforming Use. The Massachusetts case he had cited earlier was right on point. A mine was exhausted and they wanted to supplement the Use of the plant by bringing in material from off-site. The Court said that was deemed to be a new Use for that plant and not permitted. On the issue of 116th Street, it was part of the City of Carmel, therefore, any thing contiguous to 116th Street was deemed to be an urban area. The lake at the corner of 116th Street and Hazel Dell which was constructed around 1994 or 1995 was initiated at the time that the property was in an urban area and should have required a permit. But none was requested and none was required by the City. With regard to contiguous area in the 2002 case in Hamilton County, when the Court ruled that the Mueller property was an urban area, it did it on the basis that the Mueller property met the third definition of being contiguous to the City. From the statements made here, mining on the property east of Kingswood and east of Wood Creek was all one property. When Wood Creek was annexed into the City, it made that area an urban area and contiguous to the City. The comment was made about why they were bringing in materials to the plant. He appreciates their economic difficulty. The issue is not whether they can economically move that plant to comply with the zoning law. When Martin Marietta claimed in 2002 that the intent of the Mueller property was to mine it because they had a lease and it was no longer intended to be residential, the Court rejected that argument. This Board needs to reject it also. The intent of the owner for the Use of the property does not determine its Use. S-1 was deemed to be the Use of the property, irregardless of what the owner intended.

Mr. Weinkauff asked Mr. Yedlick to see the part of the Ordinance about processing not being allowed in the S-1, but permitted in M-1.

Mr. Phears stated that was the 2002 Ordinance, not the current one.

Mr. Weinkauff confirmed that it was the 2002 Ordinance.

Mr. Yedlick clarified it was the 2002 Ordinance before it was amended. In S-1, Exhibit 1B, it states the Special Uses, specifically mineral extraction, burrow pit, top soil removal and its storage. In M-1, Exhibit 2B, the Special Uses states mineral extraction, operations including sand and gravel, soil, aggregate and all related operations. Processing is permitted in M-1. The new Schedule of Special Uses does not carry over the definitions as stated in the original Ordinance. There was no intent to change anything. The Uses provided in the Schedule of Uses are burrow pit, top soil removal and storage, mineral sand and gravel extraction operations. That is the current Ordinance. The definitions are in the current Ordinance for mineral, soil, gravel extraction operations. The definition again says any process in obtaining from the earth naturally occurring substances. It says nothing about processing. The argument that processing is permitted in the S-1 district is without merit. The prior Ordinance, which is the one that was in place for this appeal, does not permit processing. The current Ordinance also supports that.

Mr. Molitor stated that in his opinion the Ordinance does not and has not distinguished between processing and mining. Processing is a part of mining under our Ordinance. In his opinion the changes made from 2002 to the re-codification of the Ordinance were not intended to make a change. There was some rearrangement of words, but that is the nature of re-codification, to clarify that there are no differences from district when the words are the same. There are differences where the words are different.

Mr. Hawkins asked what the majority of the mines was zoned in the State of Indiana.

Mr. Phears stated there are many different zones, all the way from Residential up through Industrial and some with a Special Use permit. There is not a lot of consistency. The general definition of mining both in States with a mining act and in States that have considered the issue through their Appellate Courts, is mining is all or a part of the process of mining which includes extraction and everything else. Typically all of them consider it mining from the time a shovel of dirt is turned to loading it onto trucks.

Mr. Hawkins asked Mr. Yedlick if he had authority to sign the settlement agreement on behalf of Kingswood.

Mr. Yedlick stated in the affirmative.

Mr. Dierckman moved to **affirm the Director's determination** and adopt the Findings presented by Ice Miller on behalf of the Department and Martin Marietta. The motion was seconded by Mr. Hawkins. The Public Hearing was closed.

Mr. Dierckman moved to Suspend the Rules and take a hand vote. The motion was seconded by Mr. Hawkins. The motion was **DEFEATED, 1-3.**

Mr. Molitor stated that motions are not usually made as a negative motion.

Discussion followed regarding the wording of the motion.

Mr. Dierckman moved to withdraw his motion. Mr. Hawkins withdrew his second.

Mr. Dierckman moved to Suspend the Rules to allow a motion to be made in the negative. The motion was seconded by Mr. Hawkins and **APPROVED 4-0.**

Mr. Dierckman moved to **affirm the Director's determination** and adopt the Findings as presented by Ice Miller on behalf of the Department and Martin Marietta. The motion was seconded by Mr. Hawkins.

The Board took a 5 minutes recess to allow the Department time to provide the written ballots.

The motion was **APPROVED 3-1**, with Mr. Weinkauf casting the opposing vote. **Docket No. 04070020 A, Martin Marietta; Appeal to Director's Determination of** was **REJECTED.**

Mrs. Plavchak rejoined the Board.

1h. Martin Marietta Materials - Mueller Property South

The petitioner seeks special use approval for a sand and gravel extraction operation.

Docket No. 04040024 SU Chapter 5.02.02 special use in the S-1 zone

The site is located at the southwest corner of the intersection of East 106th Street and Hazel Dell Parkway. The site is zoned S-1/Residence - Low Density.

Filed by John Tiberi of Martin Marietta Materials, Inc.

Mr. Weinkauf reminded the Board that the Public Hearing portion was still open. However, the Board has heard the presentations of both the Petitioner and the Remonstrators. They were at the point where they would proceed with the Board asking questions of the Petitioner and/or any Remonstrators.

Mr. Dierckman had questions regarding the October 19, 2004 letter from Jon Dobosiewicz to Zeff Weiss. He wanted to know Mr. Weiss's position on all the additional requests to be made to the commitments as well as the modifications to the commitments.

Mr. Weiss stated that they had modified their statement of commitments to address each of the 21 items except for the following. They had expressed to the Department concern about the installation of a round-about at the intersection of 106th Street and Hazel Dell Parkway. This was cost prohibitive and they had proposed some alternatives. This was Item #2. They had also suggested some alternative to Item #11. They presently clean the streets and will continue to do so. They did not think daily cleaning was necessary, but recognize the obligation to police and address anything that they do to the streets that might bring sand and gravel or mud onto the streets. They could do wheel-wash and other things. With respect to the strobe lights, they could modify the fleet to address them. However, ascending alarms are not permissible under current regulations for safety, so they could not meet that requirement. With regard to #21, since they did not request to mine sand and gravel after 8:00 PM that would not be applicable. Under #17, they indicated they needed 180 days to make sure they were in compliance with the berm with the commencement of the removal of the overburden. Their goal would be to achieve that earlier than later.

Mr. Phears stated that each of the commitments had been discussed with the Department. They have agreed to cut their hours of operation to 6:00 AM to 8:00 PM, under #13. They discussed with the Department to work Saturdays from 8:00 AM to 2:00 PM for a limited time. The mining regulations that the City Land Use and Annexation Committee is currently contemplating would allow longer hours of operation than what had been proposed. Otherwise the hours of operation track what is in the current mining regulations being proposed. With regard to the Water Department matters in Item #15, they have made a specific written proposal with a specific monitoring plan. The Department has indicated they are satisfied with the monitoring program. The Department has ask them to install two weirs and two flow meters at points to be designated by the Utilities Department. They have exchanged emails with John Duffy and the proposals are satisfactory. He felt they had addressed each of the issues in the letter. In some cases it was alternative language and he believed Mr. Dobosiewicz and Mr. Hollibaugh found the language satisfactory.

Mr. Dierckman asked again about #19 and the ascending alarms.

Mr. Phears stated they are not allowed under Federal law. They would agree to use the best available technology that is legal at the time. If the Director had technology that he thought was better, then they would retrofit their equipment, given six months to do so.

Mr. Dierckman asked for 60 days for the retrofit and Mr. Phears agreed.

Mr. Dierckman asked about the alternative for Item #2, instead of the round-a-bout.

Mr. Phears had proposed to the Department that they would bond the portion of the road that they use. They did not think it was reasonable to construct a round-a-bout just to serve their traffic for three to five years. The alternative would be to cross their property directly and go onto Mueller North and then up to the processing plant. That would require a determination that they could cross Mueller North without a special permit. The trucks are able to negotiate a round-a-bout.

Mr. Dierckman asked the cost of a round-a-bout.

Mr. Dobosiewicz stated that the Department estimates it at around a half million dollars. They were trying to

mitigate the negative impact on the roads. A round-a-bout may not be the best available situation. They were trying to suggest to Martin Marietta that they commit to a voluntary impact fee that could be used to make improvements within the network that they use for access to the properties, deemed most appropriate by the City Engineer. No conclusion has been reached with the Petitioner.

Mr. Phears stated that the round-a-bout in Item #2 was the only item left open to question.

Mr. Dierckman asked if they would be willing to set aside \$250,000 for a round-a-bout or whatever alternative the City determined was most appropriate.

Mr. Phears conferred with his client. Martin Marietta would be willing to contribute \$50,000 per year for a minimum of five years to a road improvement fund, in lieu of road improvements made by Martin Marietta for Items 1, 2 and 3.

Mrs. Plavchak asked about Item #11. She travels 96th Street frequently and thinks it is awful. She would hate to see 106th Street get in the same condition. Even though Martin Marietta thinks daily cleaning would not be necessary, if 96th Street is any indication of what 106th Street or Hazel Dell would look like, she thought twice a day cleaning would be needed.

Mr. Weiss stated they were in agreement with the goal to keep it clean. One thing they had discussed with the Director was to clean it periodically and if that was not enough in the Director's determination, they would move it forward to get it clean.

Mr. Phears stated they do not use the roads every day, but would be agreeable if that was the Director's determination.

Mrs. Torres also had a question about #11. She wanted to know if any cleaning was currently being done by Martin Marietta.

Mr. Phears stated they have a private contractor, but he did not know how often they cleaned.

Mr. Dobosiewicz stated the concern was that items would fall off the trucks on the turn from 106th Street onto Hazel Dell. They do not have to patrol over the issue. The Department might receive calls and if they knew it was being cleaned once a day, then that situation would not last over a 24 hour period.

Mrs. Torres asked about Item 1A on Martin Marietta's commitments that Martin Marietta would develop for approximately three to five years. Is there any feeling that the Board should say not in excess of X amount of years?

Mr. Weiss stated that it was a market-driven issue and the resources would be there even if building does not occur within the community. They would be willing to commit to no later than seven years from commencement of extraction.

Mrs. Torres also questioned the hours of operation. She thought 6:00 AM seemed early. When was construction allowed to begin?

Mr. Dobosiewicz stated that he believed according to City Code it was 7:00 AM. He would need to research. That could be one of the conditions.

Mr. Weiss stated that the issue was that these materials go to a job site and a lot of those work 7:00 AM-3:00 PM, so they need to get the materials there so that their day is not delayed. The hours are driven by the market. This tracks the Mining Ordinance that has been presented twice by the City and its consultant. They have reduced the 6:00AM-6:00 PM on Saturdays that was recommended by Mr. Glasser to 8:00 AM-2:00 PM.

Mr. Dierckman felt it should be shifted to 6:00 AM-6:00 PM or 7:00 AM-7:00 PM.

Mr. Phears stated that his client said it could be 7:00 AM-7:00 PM for this particular application only.

Mr. Dobosiewicz stated these hours would apply to the Mueller South petition and the property that is illustrated only and not any other operations of Martin Marietta, including the processing plant.

Mr. Hawkins wanted to know how much overburden and sand and gravel would be taken out and the status of the reclamation project. In the future what could the City do with this large ditch?

Mr. Phears conferred with Mr. Hoskins and stated it would be five to six feet overburden and twenty-six feet sand and gravel. The reclamation will be a ditch with grass that will drain into the existing pit, not a lake. It will be dry and below grade, but useable. The Mueller's own the property adjoining, so they would have the biggest stake in the reclamation. Economics could drive an alternative for the land.

Mr. Weiss stated that the area north of the reclamation area would be available for other development. This area is 330 feet off 106th Street. There will be a creek and this will be a flat grassy area. It could be a wildlife open space that will be approximately thirty feet below grade. In the future there will be some Use, commercial or residential, on 106th Street that will abut something that drops off considerably.

Mr. Phears stated another possibility could be that material could be put across the end and the area could be flooded, like a lot of the other properties in the area. They could not make a commitment at this time. This plan has been through a lot of engineering and they could not make any other recommends at this time. All of the hydrology studies were based on this reclamation being submitted in this way.

Mr. Hawkins asked about moving the processing plant. He wanted to know if there was any thought to trying to bring both items before the Board and moving the plant rather than going for approval on this one.

Mr. Phears stated they had had numerous discussions on that issue. His dream, if this is approved, would be to move the processing plant and settle Mueller North and all of these things would fall into place. They are not looking for a three to four year project. They are looking to move the plant and do what they have been trying to do since 2002. To do that they have to get the other application remanded back and no one has been interested in doing that. They have asked repeatedly for the neighborhood to support remanding Mueller North back so that they could do that.

Mr. Hawkins asked if they allow sand and gravel on this and nothing else, would the City in the future end up in a lawsuit for partial taking.

Mr. Phears did not think so, because the law allows reasonable Use, it does not allow every Use.

Mr. Dobosiewicz stated that maybe Martin Marietta could be asked to make a commitment not to file suit against the City or BZA for denying future applications for mining on this property.

Mr. Weiss stated it would not be their right to do that because they do not own the resources on the property at this point. The Mueller Conservatorship would have an economic interest in taking the resources out. In a worst case scenario, if someone presented a case and the Board denied it, they would seek to overturn that. That would only be ordering the Board to issue the permit; it would not wind up, in his view, as monetary damages. It would rather be ordering the Board to give someone the permit, so that they could extract the minerals.

Mr. Phears stated that Martin Marietta would not assert that this was a taking because they were allowed to mine sand and gravel and then denied mining of limestone later. They would reserve the right to say that the Board had made a mistake. They could make that a commitment.

Mr. Weinkauff stated he still had some questions regarding the commitments prepared by the Department, especially Items #1 and #3. Martin Marietta has taken themselves out of the equation for the road improvements. He felt there were still questions on how the expansion of mining would negatively affect the surrounding property values. Also, how would this activity negatively affect public safety? He was concerned about the truck traffic on Hazel Dell Parkway, especially the turns onto and off of Hazel Dell. He felt the expansion of mining within the City was a City-wide issue.

Mr. Phears stated that on the traffic issue, his client was willing to go to the 96th Street entrance and use only that entrance. He would ask that the Planning Staff and Engineering be given the authority to allow an additional access point upon appropriate traffic arrangements being made. That would eliminate 106th Street and Gray Road truck traffic.

Mr. Weinkauff stated that was fine, but there would still be lots of trucks making left turns in front of traffic.

Mr. Phears stated he was trying to eliminate making road improvements to roads they do not use. Alternatively, if they use those roads, they will make improvements to them.

Mr. Dierckman stated that Items #1, #2, and #3 would be scratched and replaced with using 96th Street entrance exclusively and providing a dedicated northbound left turn lane along Hazel Dell Parkway at the Carmel Sand Plant. He asked if they would be willing to add that they would construct that within twelve months or prior to commencement of operations, whichever was sooner.

Mr. Phears stated that the Sand Plant is currently in operation. They would commence promptly upon approval of the plans and pursue it diligently. They could make that a commitment.

Mr. Dobosiewicz stated that the Department has basically two concerns. One is with regard to access. Today there are access points to the Martin Marietta property south of 106th Street and west of Gray Road that do not have appropriately constructed access points to them. Martin Marietta is proposing to use those access points as access to the site. If Martin Marietta were to utilize those access points on 106th Street and Gray Road, appropriate improvements would be needed, including excel and deceleration tapers and passing blisters and unimpeded through lanes that would improve access generated by this site. They are not saying they would never use these other access points for other operations on their property. The Department's concern is existing traffic and the additional traffic that will be generated. The improvements would need to accommodate all access to the property. The second issue is more system related, that is the impact of additional truck traffic generated by this particular use on the overall Carmel system. Martin Marietta's \$50,000 for five years of a seven year project still leaves the City two years short of being able to address any impacts. It also leaves the City far under-funded to address the impacts they believe are associated with

truck traffic for the overall operation at that location. There is the possibility of hundreds or thousands of truck trips back and forth from the processing plant to Mueller North and ultimately moving that aggregate throughout Carmel Streets. The material from Noblesville comes down either Hazel Dell or River Road and the City has concerns about River Road being able to handle all that truck traffic.

Mr. Weinkauff asked Mr. Dobosiewicz what would be needed in the way of commitments for the extra traffic, if the Board were to approve this petition.

Mr. Dobosiewicz stated the Department wanted the access points improved subject to #1. They want access to the plant improved subject to #3. They want #2 modified to negotiate with the Petitioner an agreed upon level of impact fee or impact assessment per trip that would be for the City to use at its discretion in areas deemed necessary to accommodate this truck traffic.

Mr. Weinkauff asked if that included the existing entrances and exits off of 106th Street and Gray Road.

Mr. Dobosiewicz stated that was correct if they are used for access. The Department has not examined the impact of all the traffic generated from this Use being pushed out onto 96th Street. They would need additional time to study improvements that would be needed at 96th Street.

Mrs. Plavchak wanted clarification about what the City would be left with when this project was done, beside a 30-foot deep ditch with six inches of grass on top.

Mr. Dobosiewicz stated that the City would not be left with anything. It is owned by the Mueller Development LLC and they would be left with a dry reclamation, approximately thirty feet lower than existing grade of 106th Street, with divergent channels that led to the water that comes in across the site. The Petitioner should be able to give some estimation of how large the depressed area will be. It is zoned S-1 and could be single family residential. There is nothing in the Ordinance that suggests that the property at the bottom of a hill is somehow different than the property at the top of the hill. Unless the Board attaches a condition that it ought not to be developed under the permissible Uses under the S-1.

Mr. Dierckman commented that in San Antonio, Texas there is a former quarry that has been developed with a golf course inside of it and around the rim are probably \$3-4 million dollar homes. When he was there fifteen years ago, it was a thriving economic situation.

Mr. Phears stated there are two there that have been reclaimed. There is a mall in addition. Also Rock Hollow here in Indiana. There are a number of things that can be done. One of the things lacking in communities these days is open space, every square inch is developed with something.

Mr. Weinkauff is still bothered because Martin Marietta does not own it. Is there any representation from the Mueller's present?

Mr. Phears stated they have been here previously. The current version of the conditions requires that Mueller sign them.

Mr. Hawkins wanted to know when the lease was signed and how long does it run?

Mr. Weiss stated that it was approximately December 2000.

Mr. Phears stated they typically run a very long time, usually in excess of 30 years, often in excess of 50 years. He could not quote the exact term on this one. They usually have renewal terms.

Mr. Hawkins wanted to know what would prevent this trust from simply not paying taxes and it coming back to the community.

Mr. Phears stated if it went to public auction, it would probably be Martin Marietta most interested in it. Mueller also owns the corner next to it and all the other property in the area. Whatever the Zoning Ordinances are at whatever point in time that is all they will be allowed to do with it.

Mr. Dierckman stated that the reality in his mind is that these plants are located because of the materials, but also because of the need-driven aspect of this product within our community. In reality it might reduce the number of miles the trucks are on the road if this plant does exist in addition to the one in Noblesville. The City may end up with modestly less traffic because of the lack of need to import from other locations, depending on where this material ends up. On the property values, he thought in the extended analysis provided by Michael Lady, that Kingswood homes were pretty much in-line or modestly better.

Mr. Weinkauff stated that he agreed with the report, but that it was based on the current conditions. The concern is with the expansion of mining in the area. It is extremely difficult to project.

Mr. Hawkins asked when they should expect to see the other dockets. Would it be more prudent to see at least Mueller North and what's going on between these two parcels so that they could perhaps get the processing plant moved and a reclamation plan that makes more sense?

Mr. Dobosiewicz stated that they had been operating under the position that they were not going to docket Mueller North because of the pending litigation. They were instructed by Mr. Molitor that they could not delay docketing of the Mueller North items because of the adoption of the Rule to the Board's Rules of Procedure. This particular Petition was filed in December 2002; it went to TAC a couple of months after that. A year later they were back at TAC, six months later this is where they are. He thought the learning curve from the Department's end, specifically with regard to other TAC members, the utility, engineering and others, had been significantly enhanced. He could not commit that if they docketed Mueller North tomorrow, when it would be before the Board. Through the exploration of this Petition, they may run across technical issues they would not be prepared to present in three to four months. The Mueller North Petition may be remanded back to the Board in the spring. It was the Department's feeling that because they docketed the item and it went through the TAC procedure, it was before the Board and appropriate to be considered. One of the questions that has been raised and the Board needs to act on, if they desire, is to determine whether or not they should see this petition, the sand and gravel petition back as filed, or all five petitions at the same time. If the Department did not feel comfortable through the investigation and exploration of this petition with the consultant, this item would not be in front of the Board today. He could not commit when Mueller North might be in front of the Board. He thought it was appropriate for the Board to discuss its concern about other petitions having been filed on this property and how those petitions might affect their final disposition of this particular application.

Mr. Weinkauff stated that a month or so ago, based on the Department's recommendation, he suggested near the end of the hearing on this particular petition that perhaps it might be beneficial to hear most of those other petitions, if not all of them. It was taken somewhat negatively. They've heard statements that the processing plant cannot be moved with just Mueller South. What kind of position does that put them in when perhaps Mueller North comes to the table? He knows that each one needs to be heard on its individual merits

and the Board is not a precedent setting body, but it is a rather interesting situation.

Mr. Molitor stated there is a limited extent to which the Board is a precedent setting body. With respect to the Mueller North petition, the Board previously turned that down. That does serve as a precedent for an identical or similar petition that is pending before the Board. The Petitioner would have the burden of proving that the new petition was different from the one that was previously turned down or that the conditions had changed since it was turned down. That one is still pending before the Court and it is possible the Court might send it back to the Board at the end of its review.

Mr. Dierckman gave a recap of the changes that were made. There was a statement of commitments from Martin Marietta and a letter from Mr. Dobosiewicz that modified the statement of commitments. Martin Marietta had agreed to these things except as he modified. Items #1 & #3 would be kept in their current form. He felt #2 should be excluded because he did not feel anyone knew what they wanted and he did not know if another round-a-bout was the way to go. He felt there would be many more opportunities for clarity on that issue. On #11 he suggested that they continue to clean the road at least once daily and more if necessary. On #13 he would change it to 8:00 AM to 2:00 PM on Saturdays; however, Mondays through Fridays would be 7:00 AM to 7:00 PM. The next change would be under 15E, that would be in addition to proposals as outlined to the Department and John Duffy in regards to the water studies and so forth. Under 17, instead of 120 days of commencement, it would be 180 days of commencement. On #19, that would stay the same unless Federal laws changed and then that would permit a better use and they would try to implement the better technology within 60 days of its availability. He added Item #21 that said that Martin Marietta would not make a taking claim in regards to only permitting them to do sand extraction on this property as currently outlined in this proposal. There would be no taking in regards to any other Uses that were not allowed as a result of this approval, if it is approved. Then on the commitments, under 1A he had three to five years, but not to exceed seven years.

Mr. Weinkauff asked if Mr. Dierckman wanted to change any of the wordings in #1 and #3.

Mr. Dierckman said that they could add in #1 and #3 "promptly upon commencement and diligent effort".

Mr. Dierckman moved to approve **Docket No. 04040024 SU** including all of the changes to those two documents.

Mrs. Torres wanted to make sure that eliminating #2 was okay with the Department or did they want to have some sort of wording to provide financing.

Mr. Dobosiewicz stated that the Department was recommending that the Board deny the request based upon the commitments as amended by Mr. Dierckman.

Discussion followed regarding leaving Item #2 out and the cost of an impact on the roads. The Department was not comfortable with the modifications.

Mr. Dierckman's motion died from lack of a second.

Mr. Dobosiewicz stated that the Department was unable to recommend favorable consideration on the proposal based upon the commitments as amended. Recommending to deny may be too strong of a position to take.

Mr. Phears asked if it was the traffic issue that needed to be sorted out. He understood that it would not work for Martin Marietta to just use 96th Street because that meant there would not be improvements on 106th Street that the Department did want to see made. If that was the issue, could they address that? He understood Mr. Dierckman's motion to require those 106th Street improvements, Items #1 and #3, to be made, which was different from what Martin Marietta had offered to do. He thought he understood later that there was going to be some payment condition on top of that.

Mr. Dobosiewicz stated that was part of the reason he wanted to modify and clarify the Department's position. There has been a lot bantered back and forth and without taking an opportunity to digest what has been said, they were uncomfortable with recommending favorable consideration. Secondly, the \$50,000 per year for five years does not cover the proposed length of seven years. He did not feel that estimation covered the impacts associated with extracting the sand and gravel off this location.

Discussion followed regarding the impact fees and commitments by the Department and the Petitioner.

Mr. Dobosiewicz stated that personally he did not fully understand how all the deletions, additions, and changes that had made this evening affected the Department's view. Therefore, he was not comfortable with making a favorable recommendation.

Mrs. Plavchak asked Mr. Dobosiewicz if he wanted more time to do a study on how much was needed for impact fees.

Mr. Dobosiewicz asked that the Board consider directing their counsel to prepare a document based upon the discussion this evening and all the changes that had been made. Also, for the Department to set down with the Petitioner and determine, based upon input from the mining consultant, what they believed to be an appropriate assessment. They want to be able to come back to the Board with a recommendation that is based on clear and concise information.

Mr. Thrasher asked if the Board had received commitments proposed by the Remonstrators.

Mr. Weinkauff stated they had received the Remonstrators proposed Findings of Fact.

Mr. Dobosiewicz indicated that they had also received a list of commitments.

Mr. Dierckman moved to table this Petition, **Docket No. 04040024 SU**, to the next regular BZA meeting on November 22, 2004, to give the Department time to work with the Petitioner and complete a final set of commitments based upon the October 19 letter. At the next meeting the Board would deal just with the commitments and make a final decision with no more public input.

Discussion followed regarding looking at the Remonstrators' commitments. Not all of the Board members could find their copy.

Mr. Weinkauff wanted to leave open the opportunity to discuss the Remonstrators' conditions.

Mr. Thrasher wanted the Remonstrators to be consulted for the commitments.

Mr. Dobosiewicz stated that it is unusual for the Department to meet with the Petitioner in the presence of someone who is opposed to their Petition to decide what they are going to commit to. In past meetings with

Mr. Weiss and Mr. Thrasher, they have gotten relatively little done. He would be glad to meet with Mr. Thrasher. The Department's consideration of the Remonstrators' proposed commitments and what the Department delivered to Martin Marietta has been taken into consideration by Martin Marietta and been presented to the Board last week with a transmittal of information. There was a red-line version and a black-line, as well as the comments of Mr. Thrasher based upon his client's wishes. Those were all things the Department considered in formulating the letter and he thought Mr. Thrasher would agree that some of the comments within the Department's letter are ones that Mr. Thrasher had suggested in his transmittal to the Board on August 24. The Department does not feel that any of the additional proposed modifications are necessary for the Board to conclude their deliberation.

Mr. Thrasher stated that the Department was filtering what the Board received.

Mr. Dobosiewicz stated that the Department is not filtering. The Board received both the comments and the red-line and black-line version in October.

Mr. Thrasher stated that they had heard Martin Marietta's commitments and the Department's recommendations, but nothing came out as to what was rejected of the Remonstrators' commitments. He had a couple that he would submit through the Department in the intervening time.

Mr. Dobosiewicz wanted the Board to understand they had not rejected any of Mr. Thrasher's commitments. He would like to see the Board acknowledge that they received both in August and through this last transmittal all the information Mr. Thrasher has presented. The Board can take all the time they need to have discussion with Mr. Thrasher and have him propose and discuss them.

Mr. Weinkauff stated for public record that the Department has never filtered any information. Neither he nor Mrs. Torres had a copy of the Remonstrator's commitments, but they could be with all the other information they have received.

Mrs. Torres seconded the motion to Table the Petition.

Mr. Dobosiewicz wanted the Board to make clear to everyone involved explicitly what their instructions are with regard to the Tabling, whether that is the addition of information, what exactly is supposed to happen between now and the next meeting so that the Department is not in a precarious situation of being accused of distributing information whether or not they think it is the Board's instruction or not.

Mr. Weinkauff again went on record to say that the Department has never not submitted information to Board members and definitely never filtered anything.

Mr. Hawkins asked when the last two times the parties had met were.

Mr. Weiss stated they had never had substantive discussions with the Remonstrators about how they might work this out. They have met to talk about procedure. But he did not believe that Mr. Thrasher had ever been authorized to talk about how to resolve this.

Mr. Hawkins had concerns about having the Department act as some sort of liaison. He did not believe that was their role in this situation. He would rather see the two parties come together and if they could not come to a conclusion then they couldn't.

Mr. Phears stated they have offered to meet and are available to meet.

Mr. Thrasher wanted to know if they really wanted a litany of the meetings. He felt he knew pretty much how the vote was going to go. He was trying to get the best commitments for the neighborhood to protect their interests. He would anticipate a three-party meeting or he could meet with Jon Dobosiewicz and he could convey their wishes so it could get ironed out before the next Board meeting. His point in the filtering was that at no time did he hear the wishes of the Remonstrators expressly indicated in the entire conversation. It was always two parties and the Remonstrators' wishes had disappeared.

Mr. Molitor stated that the Board is at the point in the proceedings where the Board initiates the questions to the participants, not the other way around. He admonished the members of the audience and participants to wait for questions from the Board.

Mr. Dierckman stated that in reviewing the Remonstrators' commitments he could see a lot of similarities in Mr. Dobosiewicz's letter. Mr. Dobosiewicz had done a pretty good job of trying balance things. They have made a lot of progress in the issues that were still outstanding and needed further refinement. His thought was to take all the talk they have had and implement those changes into the commitments, along with all the changes that were stipulated in the letter into one document, so they would only be dealing with one document next meeting. Relative to the round-a-bout and after the Remonstrators' comments, he was of the impression the Department was willing to talk to the Petitioner to work out a set of commitments to present to the Board.

Mr. Dobosiewicz stated that his recommendation or observation was that if the Board was going to table the petition that they would specifically illustrate to all the parties involved what their expectations were and narrowly define that. He stated that he heard to make all the changes that were proposed and offered by the Petitioner in the form of those commitments and resolve this one issue with regard to impact fees. And the Board does not want to have any more information transmitted to them regarding testimony, subject to Mr. Molitor providing direction that that is appropriate. He does not want to get into another situation like last week. The Department was inundated with a significant degree of information that they were required to disseminate over a very short period of time. Then to come to the Board with a written recommendation which was a recommendation to approve subject to the acceptance of and recording of enclosed commitments that they had agreed to in principal, but not completely. They were trying to tie this together in a short time and they are being accused of not delivering information to the Board based upon what they believed to be the instructions.

Mr. Weinkauff agreed that one document for the commitments made sense. He did not feel they needed to have any additional testimony. They had basically closed the testimony and kept the Public Hearing portion open so they could ask questions. He still wants to keep the Public Hearing portion open so that the Board can ask questions. There may be questions of the Remonstrators at the next meeting. He would suggest that based on normal procedure that the Petitioner meets with the Department independently. He would suggest that the Department allow the Remonstrators or their representative(s) to meet with the Department and get their opinion on the document once it has been put together by the Department and Petitioner. Hopefully that will save some time at the next meeting. That gives a month to get this done. At that time hopefully the Board can reach a conclusion.

Mr. Molitor had no problems with the way Mr. Weinkauff stated the procedure.

The motion to **TABLE** was **APPROVED 5-0**.

Mr. Dobosiewicz stated that the Plan Commission had elected to modify their meeting dates to November 30 and December 14, which keeps them out of the Carmel Schools winter break. The Department recommendation for the BZA December meeting would be December 6 or 13 either/or for the Board or a Hearing Officer. He did not think anyone would want to meet on December 21 during the Carmel winter break.

Mr. Weinkauff asked for an email to the Board to finalize the date within the next 48 hours.

J. New Business.

1j. Proposed amendments to Article IX (BZA Rules of Procedure), Section 30.08: Alternate Procedure (Hearing Officer), and Chapter 21: Special Uses.

This item was **TABLED** and added to the next agenda.

K. Adjourn.

Mrs. Torres moved to adjourn. The motion was seconded by Mr. Hawkins and **APPROVED 5-0.**

The meeting was adjourned at 11:10 PM.

Charles Weinkauff, President

Connie Tingley, Secretary